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## Significant Montana Cases

Hannah Higgins

Katy Lindberg

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# LEGAL SHORTS

## SIGNIFICANT MONTANA CASES

**Hannah Higgins & Katy Lindberg\***

### I. *IN RE MARRIAGE OF ELDER & MAHLUM*<sup>1</sup>

In *In re Marriage of Elder & Mahlum*, the Montana Supreme Court held that Montana statute does not consider post-dissolution Sheriffs' Retirement System disability retirement benefits to be a marital estate asset.<sup>2</sup> The Court reversed and remanded the case for the equitable division of the marriage's assets after determining that the district court erred in finding a husband's post-dissolution SRS disability retirement benefits to be a marital asset.<sup>3</sup>

In 2002, Sam Mahlum and Terri Elder got married.<sup>4</sup> During their marriage they had two children and lived in Augusta, Montana.<sup>5</sup> While Terri worked as a substitute teacher and stayed home to care for their children, Sam worked as a deputy sheriff for the Lewis and Clark County Sheriff's Office.<sup>6</sup> Sam sustained a permanently disabling injury in 2006 in a work-related motor vehicle accident, which forced him to leave the job six years later in 2012 and work at the Montana Human Rights Bureau.<sup>7</sup> Similarly though, his injuries caused him to leave that job in 2015.<sup>8</sup> Thereafter, he

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\* Candidates for J.D. 2021 at the Alexander Blewett III School of Law at the University of Montana.

1. 462 P.3d 209 (Mont. 2020).

2. *Id.* at 214, 218.

3. *Id.* at 218.

4. *Id.* at 210.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

obtained a disability determination from the Montana Public Employee Retirement Board and began receiving monthly, non-taxable disability retirement benefits from the Montana Sheriff's Retirement System ("SRS").<sup>9</sup> Sam is eligible to continue receiving these disability benefits until 2025, when he becomes eligible for normal, taxable SRS retirement benefits at age 50.<sup>10</sup>

In 2017, Terri filed for dissolution. The final decree of dissolution of marriage, which divided the marital estate and provided for a child custody arrangement, was ordered a year later.<sup>11</sup> At the time of the dissolution, Sam was receiving \$3,397.73 in monthly disability benefits with a 3% guaranteed annual increase.<sup>12</sup> Terri's adjusted gross income in 2017 was \$17,054.<sup>13</sup>

In the dissolution, the parties agreed that Terri would keep the home (which had a \$140,000 outstanding mortgage balance); that each party would assume their own student loan and debts; that Sam would take all the couple's outstanding credit card and federal tax debt along with his own medical debts; and that Terri would keep both vehicles, while Sam would keep the Harley Davidson motorcycle.<sup>14</sup> Child support was not addressed, and spousal maintenance was not requested.<sup>15</sup> However, the divisibility of Sam's SRS disability retirement benefits was disputed until the district court found the benefits should be equitably divided because they were no different than Sam's normal SRS retirement benefits.<sup>16</sup> Based on this finding, the district court apportioned Sam's SRS benefits—including those he received prior to the switch to regular SRS service retirement benefits—between Terri and Sam on a 50/50 basis.<sup>17</sup> Sam appealed the finding.<sup>18</sup>

Under Montana law, district courts are given broad discretion when dealing with an equitable division of marital assets.<sup>19</sup> A district court's findings of fact must show that the division of assets is equitable<sup>20</sup> and that the apportionment is fair and reasonable under the totality of circumstances.<sup>21</sup> Abuse of discretion may occur when the court relies on a clearly erroneous

9. *Id.*; MONT. CODE ANN. § 19-7-102 (2019).

10. *Elder and Mahlum*, 462 P.3d at 210.

11. *Id.*

12. *Id.* at 210–11 (amounting to roughly \$40,772.76 per year).

13. *Id.* at 211.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*; see MONT. CODE ANN. § 40-4-202(1).

20. *Elder and Mahlum*, 462 P.3d at 211–12 (notably, a true 50/50 split is not required).

21. *Id.*

finding of fact or conclusion of law.<sup>22</sup> Findings of fact accounting for and valuing marital estate assets and liabilities are reviewed for clear error—meaning it is not supported by substantial evidence, the lower court made a misapprehension, or the Court has a firm and definite conviction that a mistake was made—and the ultimate apportionment of marital assets is reviewed for an abuse of discretion.<sup>23</sup>

To support its finding that Sam’s early SRS disability retirement benefits were post-dissolution employment income (rather than a divisible marital asset) the Court analyzed various statutory defined benefit retirement plans for state and local government employees.<sup>24</sup> This was the first time the Court ever considered whether defined benefit plan disability benefits, administered under Title 19, Chapter 2 of the Montana Code Annotated, should be treated the same way as regular SRS retirement benefits.<sup>25</sup>

Under statutory SRS defined benefit retirement plans,<sup>26</sup> normal service retirement benefits are based on length of service (a group-particular percentage of the highest average compensation over those years) and are paid from group-specific retirement funds funded by payroll withholdings and employer contributions.<sup>27</sup> Ordinary retirement benefits are generally considered to be marital estate assets and are subject to equitable division under § 40-4-202(1) because they are considered to be deferred compensation.<sup>28</sup> However, SRS service-related disability retirement benefits are a different type of benefit that cannot be treated as a divisible marital asset, according to the Court.<sup>29</sup>

In examining the different types of SRS normal service, early service, and non-service related disability retirement benefits, the Court concluded that all the plans not only have similar eligibility requirements, but they also have similar calculation methods.<sup>30</sup> Put simply, the plans were “essentially a form or derivative of previously earned but deferred compensation, later payable upon particular retirement eligibility.”<sup>31</sup> The important notable factor for SRS retirement benefits in a marriage dissolution is that the benefits are considered to be deferred compensation that has been earned during the

22. *Id.* at 212 (citing *In re Marriage of Bessette*, 434 P.3d 894, 898–99 (Mont. 2019)).

23. *Id.*

24. *Id.* at 212–15 (including normal service retirement, early service retirement, and disability retirement benefits).

25. *Id.* at 213–14.

26. *See generally, e.g.*, MONT. CODE. ANN. § 19-2-101 through § 19-3-2143, § 19-5-101 through § 19-9-1303.

27. *Elder and Mahlum*, 462 P.3d at 212.

28. *Id.* at 213.

29. *Id.* at 214, 217–18.

30. *Id.* at 214.

31. *Id.*

marriage.<sup>32</sup> However, the treatment and calculation for SRS service-related disability benefits differs because, unlike the previous types, these benefits do not depend on reaching a certain age or being vested—they only depend on whether the person was injured in the line of duty and can no longer perform job duties because of their disability.<sup>33</sup>

In considering this difference, the Court explained that post-dissolution employment income does not count as a marital estate asset because it has not yet accrued and thus does not yet belong to either party.<sup>34</sup> SRS disability retirement benefits that are based upon an injury that rendered an SRS member unable to work before completing 20 years of service act as compensation for the lost income that the member would have been able to earn but for the disability.<sup>35</sup> Accordingly, future post-dissolution income that is replaced by post-dissolution SRS disability retirement benefits cannot be considered marital assets under § 40-4-202(1).<sup>36</sup>

Following this analysis, the Court held that Sam's service-related disability retirement benefits are more similar to a replacement of future employment income rather than deferred income for work previously completed.<sup>37</sup> The error of the district court, then, was not that the court considered Sam's disability income to be a replacement of future income, but that it erroneously considered that income to be divisible as a marital estate asset under § 40-4-202(1).<sup>38</sup>

Nevertheless, although the benefits are not divisible as a marital asset in the dissolution, they should still be considered when determining how to equitably divide the marital estate.<sup>39</sup> Thus, in the present case, Terri's and Sam's marital estate was not equitably divided since the disability retirement benefits were erroneously included as a marital asset.<sup>40</sup> Instead, the disability retirement benefits only should have been considered in whether any spousal maintenance should be granted to Terri.<sup>41</sup>

Going forward, the Montana practitioner should take heed of which statutes are relevant in determining retirement benefits. The analysis largely comes down to when and how the benefit will be received by the working or disabled recipient. Notably, the treatment of SRS early disability retirement benefits is unique compared to other SRS retirement benefits. This

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32. *Id.*

33. *Id.* at 214–15.

34. *Id.*

35. *Id.* at 214.

36. *Id.* at 215.

37. *Id.* at 217–18.

38. *Id.* at 217.

39. *Id.*

40. *Id.*

41. *Id.* at 217–18.

could foreshadow a changing front in the way the Montana Supreme Court treats not only retirement benefits (particularly disability retirement benefits), but how marital estates are equitably divided. For now, though, it is important for the Montana practitioner to know that SRS early disability retirement benefits receive different treatment under Montana statute.

—Hannah Higgins

## II. *MARYLAND CASUALTY COMPANY v. THE ASBESTOS CLAIMS COURT*<sup>42</sup>

In *Maryland Casualty Company v. The Asbestos Claims Court*, the Montana Supreme Court held that the Restatement (Second) of Torts § 324(A) is an additional prerequisite for determining whether an individual that affirmatively undertakes to provide aid or services to a third party owes a duty of reasonable care to others based on the foreseeable harm or risks arising from the third party's conduct.<sup>43</sup> Now, Montana practitioners must consider an elemental formulation of § 324(A)<sup>44</sup> in conjunction with the analysis of the foreseeability of harm and public policy considerations, in order to determine whether an alleged tortfeasor owes a common law duty of reasonable care to others based on the actions of a third party.<sup>45</sup>

In the early 1920s, Edward Alley formed the Zonolite Company, which mined and processed vermiculite in the Libby, Montana area using open-pit mining techniques, mill facilities, and screening/loading facilities.<sup>46</sup> It was acquired by W.R. Grace and Company ("Grace") in 1963.<sup>47</sup> Grace continued to mine and process vermiculite ore from the Libby area until 1990.<sup>48</sup> The raw vermiculite ore was processed at a mountainside mill using both dry-mill and open wet-mill processes until 1974 when all processes were switched to closed wet-milling.<sup>49</sup> The open wet-mill and

42. 460 P.3d 882 (Mont. 2020) (majority opinion).

43. *Id.* at 907.

44. RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A) (AM. LAW INST. 1965) (the elemental formulation being: (1) whether the tortfeasor affirmatively undertook to render aid or services to a third party; (2) whether the tortfeasor should recognize that aid or those services to be necessary for the protection of other person or property under the circumstances; and (3) one or more of the following special circumstances exist: (a) tortfeasor fails to use reasonable care and the preexisting risk of harm to others—which is at issue—increases; (b) the tortfeasor assumes some responsibility of the third party to perform a preexisting legal duty of care owed by the third party to the others at issue; or (c) the harm occurs because the others or the third party relied on the tortfeasor to competently perform the undertaking).

45. *Maryland Cas. Co.*, 460 P.3d at 901.

46. *Id.* at 887.

47. *Id.*

48. *Id.*

49. *Id.*

dry-mill processes caused a huge amount of asbestos-laden airborne dust.<sup>50</sup> After being processed, the product would move to the screening/loading facility where it was screened, sorted, and then stored or shipped to various areas around the country.<sup>51</sup>

Although not all vermiculite naturally occurs with asbestos, the vermiculite mining site in Libby was mixed with hazardous amphibole asbestos.<sup>52</sup> Due to the hazardous nature of the vermiculite being mined at Libby, the Industrial Hygiene Division of the Montana Board of Health inspected and studied Grace's facilities, often reporting extreme levels of airborne dust—especially in the mill facility—which increased employee risk of silicosis and asbestos-related disease.<sup>53</sup> The asbestos dust hazard was a constant concern to Grace, who received repeated notices, warnings, and recommendations from the Montana Board of Health and other entities, including its workers' compensation insurer.<sup>54</sup>

Maryland Casualty Company ("MCC") undertook to provide Grace with workers' compensation insurance from 1963 through 1973 under a policy that included limiting language reserving MCC's right to inspect, or not inspect, Grace's workplace.<sup>55</sup> MCC actively inspected, monitored, and conferred with Grace regarding the asbestos dust hazard.<sup>56</sup>

Grace employees were required to undergo a pre-employment physical examination and chest x-ray.<sup>57</sup> After receiving a report from a Libby doctor who was growing concerned of developing asbestos-related lung conditions within Grace's employees, MCC began formulating a program to control and prevent asbestos dust related problems.<sup>58</sup> The program aimed to control the asbestos dust, implement safety protocols, streamline workers' compensation claims, protect Grace's employees from dust that could not be controlled, and provide regular medical attention (including x-rays) to monitor employee lung conditions.<sup>59</sup> It is unclear to what extent Grace implemented this program, but it is clear that Grace did expand its health screening pro-

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50. *Id.*

51. *Id.* at 887–88.

52. *Id.* at 888.

53. *Id.*

54. *Id.* at 889.

55. *Id.* at 888–89 (The language further qualified any MCC inspection as an inspection relating to the insurability of Grace's workplace rather than a safety inspection. It also explained that MCC did not warrant a safe or healthful workplace or warrant that the workplace complied with laws and regulations.).

56. *See generally id.* at 888–91.

57. *Id.* at 889.

58. *Id.* (MCC used their Engineering Division and their Medical Division in developing the program).

59. *Id.* at 890.

gram.<sup>60</sup> Although MCC recommended lowering and maintaining the dust levels at 5 million particles per cubic foot or less, Grace voluntarily set its levels at 10 million particles per cubic foot and considered MCC's recommendations to be "unreasonable[,] impossible[,] and unnecessary."<sup>61</sup> MCC continued to provide substantial risk management and support through 1974.<sup>62</sup>

One particular employee, Ralph Hutt, worked for Grace for approximately 18 months between 1968 and 1969 at the mountainside mill and the mining site.<sup>63</sup> He was provided with a paper respirator, which he was not required to wear, and was denied a safer respirator.<sup>64</sup> Although Hutt was in a group of sixty workers that MCC recommended be more regularly tested, Grace rejected the recommendation and only tested Hutt prior to his hiring and prior to his leaving employment.<sup>65</sup>

MCC's involvement in the mitigation of the asbestos dust hazard was apparent.<sup>66</sup> In fact, certain internal MCC communications reflect an awareness and growing concerns relating to the medical results from Grace's employees.<sup>67</sup> Other documents reflect MCC's awareness that the asbestos-dust levels at the Grace mill continuously exceeded industry standards from 1967 through 1969.<sup>68</sup>

Hutt brought negligence and bad faith claims against MCC after developing respiratory problems in 1990.<sup>69</sup> After the parties filed cross motions for summary judgment on Hutt's negligence and bad faith claims, the Asbestos Court (1) granted MCC summary judgment on Hutt's bad faith claim due to the fact that he had never brought a predicate workers' compensation claim, (2) granted Hutt summary judgment on the grounds that MCC owed Grace's employees a legal duty of care based on the foreseeability of the risk of harm, and (3) denied summary judgment to both parties on whether the negligence claim was time-barred by the statute of limitations.<sup>70</sup>

The Montana Supreme Court considered on de novo review whether the Asbestos Court erred in finding that MCC did owe Grace's employees a common law duty to warn them of a known risk of harm caused by Grace's actions.<sup>71</sup> It found that the Asbestos Court reached the right decision but on

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60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 891–92.

64. *Id.* at 892.

65. *Id.*

66. *See generally id.* at 888–91.

67. *Id.* at 908–12 (Gustafson, J., with Shea, McKinnon, JJ., concurring).

68. *Id.* at 891.

69. *Id.* at 892.

70. *Id.*

71. *Id.* at 892–93.



incorrect grounds.<sup>72</sup> According to the Court, the correct grounds are based on an application of the Restatement (Second) of Torts § 324(A), which the Asbestos Court failed to apply.<sup>73</sup>

The essential elements of a negligence claim are (1) a legal duty owed to the claimant; (2) breach of the legal duty; (3) harm caused by the breach; and (4) damages.<sup>74</sup> A legal duty may arise from common law or from statute.<sup>75</sup> It is widely established in Montana law that whether a tortfeasor owed a claimant a legal duty of care is a matter of law.<sup>76</sup> Generally, an individual owes a common law duty of care to another when the harm is reasonably foreseeable under the circumstances and the imposition of such duty comports with public policy.<sup>77</sup> Under that analysis, there is no common law duty to protect others from acts of a third party except where a special relationship—of which there are varying types—or an affirmative undertaking exists.<sup>78</sup> Under the common law, two types of affirmative undertakings give rise to a special duty: first, a duty to another based on an affirmative undertaking,<sup>79</sup> and second, a duty to a third party based on an affirmative undertaking.<sup>80</sup>

Prior to this case Montana had not yet adopted § 324(A).<sup>81</sup> But, in deciding that MCC did owe a duty to Grace's employees, the Court discussed the application of both § 323 and § 324(A).<sup>82</sup> The Court found that § 323 was not applicable to this case because MCC did not affirmatively undertake any action—like providing aid or services—that directly affected Hutt or Grace's other employees, aside from the risk management program provided to Grace.<sup>83</sup> Thus, the Court found that MCC owed no special duty to Grace's employees under § 323.<sup>84</sup>

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72. *Id.* at 892–93, 907.

73. *Id.* at 907.

74. *Id.* at 893 (citing *Krieg v. Massey*, 781 P.2d 277, 278–79 (Mont. 1989)).

75. *Id.* (citing *Fisher v. Swift Transp. Co.*, 181 P.3d 601, 606 (Mont. 2008)); MONT. CODE ANN. §§ 1-1-105, -107, -108, -109.

76. *Maryland Cas. Co.*, 460 P.3d at 894 (citing *Bassett v. Lamantia*, 417 P.3d 299 (Mont. 2018)).

77. *Id.* (citing *Prindel v. Ravalli County*, 133 P.3d 165, 178–80 (Mont. 2006); *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 133–40 (Mont. 1996)).

78. *Id.* at 895.

79. RESTATEMENT (SECOND) OF TORTS: NEGLIGENT PERFORMANCE OF UNDERTAKING TO RENDER SERVICES § 323 (AM. LAW. INST. 1965).

80. RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A) (AM. LAW INST. 1965).

81. *Maryland Cas. Co.*, 460 P.3d at 901.

82. *Id.* at 896–904.

83. *Id.* at 896–97 (discussing *Nelson v. Driscoll*, 983 P.2d 972 (Mont. 1999) (where a police officer was held liable for the wrongful death of an impaired pedestrian after releasing the pedestrian from a traffic stop and directing her to leave her vehicle)).

84. *Id.* at 897.

Conversely, though, the Court—in adopting § 324(A)—found that MCC owed a special duty of care to protect Grace’s employees from foreseeable risks of harm caused by Grace’s conduct because of MCC’s affirmative undertakings or services that it provided to Grace.<sup>85</sup> The Court, contrary to Hutt’s arguments, found § 324(A) to be a “consistent extension” of Montana common law tort principles.<sup>86</sup> It based its decision on the fact that § 324(A) is widely applied in other state and federal jurisdictions and (although there aren’t many cases with similar circumstances applying § 324(A)) those cases that mirrored the facts of the present case demonstrated the section’s utility in determining whether a common law duty existed.<sup>87</sup> Particularly, the Court analyzed *Fackelman v. Lac d’Amiante du Quebec*,<sup>88</sup> which held that § 324(A) provides a useful “elemental formation” in determining whether an insurer owes a common law duty of reasonable care based on third-party actions.<sup>89</sup>

Following its formal adoption of § 324(A), the Court walked through the section’s factual predicates that give rise to a special duty: (1) increased risk, (2) assumption of another’s legal duty, or (3) reliance on an undertaking.<sup>90</sup> These factual predicates arise in a situation where the alleged tortfeasor provided services to a third party that were necessary, under the circumstances, to protect others and the harm arose from the independent actions of the third party.<sup>91</sup> The first predicate—increased risk—is established where a claimant states<sup>92</sup> or shows<sup>93</sup> sufficient facts to conclude that an affirmative action by the alleged tortfeasor caused such a change in pre-existing conditions that it increased the risk of harm to others beyond whatever risk was initially created by the third-party conduct.<sup>94</sup> The second predicate—assumption of another’s legal duty—is established where a claimant states or shows sufficient facts to conclude that the tortfeasor knowingly assumed (via performance or otherwise) a part of the third

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85. *Id.* at 907.

86. *Id.* at 901.

87. *Id.* at 899.

88. 942 A.2d 127 (N.J. Super. Ct. App. Div. 2008) (a case with facts strikingly similar to the present case: a 19 year-old man worked in an asbestos mine for a ten-month period, his health was monitored, he never received the result of the monitoring, was never required to wear a mask, and was diagnosed with asbestosis in 2002. The workers’ compensation employer conducted air surveys, provided a safety program, and was aware of the hazardous air quality levels).

89. *Maryland Cas. Co.*, 460 P.3d at 900–01.

90. See generally *id.* at 901–07; RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A) (AM. LAW INST. 1965).

91. *Maryland Cas. Co.* 460 P.3d at 897; RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A).

92. Pursuant to MONT. R. CIV. P. 12(b)(6) (2019).

93. Pursuant to MONT. R. CIV. P. 56.

94. *Maryland Cas. Co.*, 460 P.3d at 901–02; RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A)(a).

party's duty to others that is related to the harm at issue.<sup>95</sup> The final predicate—reliance on the undertaking—is established where a claimant states or shows sufficient facts to conclude that the claimant or the third party relied on the alleged tortfeasor's undertaking (or an aspect thereof) and such reliance caused the claimant or third party to forego taking precautions or otherwise remediating the risk at issue.<sup>96</sup> In order to establish a showing of reliance under §324(A)(c) the claimant must demonstrate (1) the claimant's awareness of the alleged tortfeasor's undertaking or awareness of an aspect thereof; (2) reasonable belief by the claimant that the alleged tortfeasor would competently provide aid or services, in full or in part, at issue; and, (3) that the claimant did not take precautionary or remedial measures due to relying on the alleged tortfeasor's undertaking.<sup>97</sup>

Applying all of this to the case at hand, the Court considered the parties' summary judgment motions.<sup>98</sup> It found that Grace, as an employer, owed its employees a general common law duty to provide both a reasonably safe workplace and tools against workplace risks that were reasonably foreseeable, including warning of those invisible dangers.<sup>99</sup> Further, just providing risk management programs incident to workers' compensation insurance was insufficient to establish that MCC assumed, in any capacity, Grace's independent duty to provide a safe workplace.<sup>100</sup>

Ultimately, based upon the available Rule 56 record, the Court held that MCC owed a common law duty of care to Grace's employees, including Hutt, under § 324(A)(b) and § 324(A)(c).<sup>101</sup> The Court explained that many of the issues relating to how Grace took MCC's advice and how MCC exclusively provided medical evaluations and monitoring were beyond genuine dispute for the Rule 56 record.<sup>102</sup> MCC's assumption of the employee-specific medical monitoring created a duty for MCC to act with reasonable care to protect Grace's employees from the known risk of asbestos exposure because, under § 324(A)(b), it constituted an assumption of a

95. *Maryland Cas. Co.*, 460 P.3d at 902–03 (whether the duty was nondelegable does not preclude a finding of assumption of the duty and proof that the alleged tortfeasor was going to completely assume the duty is not necessarily required); RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A)(b).

96. *Maryland Cas. Co.*, 460 P.3d at 903–04 (proof that the claimant or third party tried to cease or forego taking precautionary or remedial measures is not necessarily required in the statement of showing of sufficient facts); RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324(A)(c).

97. *Maryland Cas. Co.*, 460 P.3d at 903–04.

98. *Id.* at 904–06.

99. *Id.* at 904.

100. *Id.* at 905.

101. *Id.* at 906–07.

102. *Id.* at 905–06.

duty owed by Grace to its employees.<sup>103</sup> MCC owed a duty under § 324(A)(c) because Grace relied on MCC to perform a specific aspect (medical evaluations and recommendations) of the workplace safety and risk management.<sup>104</sup>

Thus, although the Abestos Court reached its conclusion on incorrect grounds, the holding was ultimately correct.<sup>105</sup> Accordingly, the Court affirmed that, under the circumstances, MCC owed a common law duty to Grace's employees to use reasonable care to warn them of the known risk of asbestos exposure and its dangers.<sup>106</sup>

The case is laden with concurrences, beginning with Justice Gustafson's concurrence, which Justices Shea and McKinnon joined.<sup>107</sup> Justice Gustafson agreed with the Court's holding, but expressed that MCC should have owed a duty to Grace's employees under all three § 324(A) predicates.<sup>108</sup> She argued that sufficient facts existed to show that, under § 324(A)(a), MCC increased the preexisting risk by concealing the asbestos harm from Grace's employees.<sup>109</sup> Justice Gustafson detailed the extensive correspondence that showed an understanding by MCC that the dust problem existed and that a safety plan—including medical involvement—would be required to deal with the issue.<sup>110</sup> The correspondence also showed that MCC intended to conceal information about the asbestos issue regardless of the fact that a local Libby doctor had noticed lung abnormalities in many of Grace's employees.<sup>111</sup> Justice Gustafson concluded that the record showed clear evidence of MCC increasing the risk to Grace's employees with its actions that concealed the true harm of the asbestos.<sup>112</sup> Thus, MCC owed a duty of care to Grace's employees, including Hutt, under § 324(A)(a).<sup>113</sup>

Regarding § 324(A)(b) and (c), Justice Gustafson agreed that MCC owed Grace's employees a duty because of the assumption of a duty and the reliance by Grace on that assumption.<sup>114</sup> She believed that MCC, in its actions to provide risk management, went way beyond that of merely providing workers' compensation insurance.<sup>115</sup> According to Justice Gustafson, MCC's actions indicate that it assumed a large portion of Grace's duty to

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103. *Id.* at 906.

104. *Id.* at 906–07.

105. *Id.* at 907.

106. *Id.*

107. *Id.* at 908–14 (Gustafson, J., with Shea, McKinnon, JJ., concurring).

108. *Id.*

109. *Id.*

110. *Id.* at 908–12.

111. *Id.* at 911.

112. *Id.* at 912–13.

113. *Id.* at 913.

114. *Id.*

115. *Id.*

provide a safe workplace to Grace's employees, and thus MCC owed a duty to Grace's employees under § 324(A)(b).<sup>116</sup> Further, she argued that the Court applied § 324(A)(c) too narrowly under the facts of this case because, contrary to the Court's holding, Hutt was able to show that he relied on MCC's lack of communication of the x-ray results as meaning that there was no existing harm.<sup>117</sup> Consequently, MCC also owed a duty under § 324(A)(c).<sup>118</sup>

Next, Chief Justice McGrath wrote to concur with both the Court's opinion and Justice Gustafson's concurrence.<sup>119</sup> In his concurrence he addressed another issue: Grace's bankruptcy potentially precluding workers' claims against MCC.<sup>120</sup> The Chief Justice elucidated that Hutt and other potential employee plaintiffs will not be precluded from recovering from MCC where the plaintiff can show that MCC breached its duty and the breach caused the plaintiff's injuries.<sup>121</sup> Because Hutt's claims<sup>122</sup> do not satisfy the "derivative liability" requirement under § 524(g) of the Bankruptcy Code,<sup>123</sup> the harm suffered is predicated on MCC's individual conduct.<sup>124</sup> Consequently, any recovery must come from MCC's assets.<sup>125</sup> The final concurrence, provided by Justice Shea, explained that he declined to join Chief Justice McGrath's concurrence because the issue of bankruptcy had not been briefed in this case.<sup>126</sup>

Following, Justice McKinnon provided her own concurrence that agrees with the Court's Opinion and with the Chief Justice's and Justice Gustafson's concurrences.<sup>127</sup> However, Justice McKinnon believed that the use of § 324(A) is an unnecessary route to identify if a duty exists because Montana precedent had already provided an adequate framework.<sup>128</sup> She elaborated that, while § 324(A) does not produce an inconsistent result, Montana's precedent already supports a finding that a duty exists where the duty comports with public policy and the defendant could have foreseen

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 914 (McGrath, J., with Gustafson, McKinnon, JJ., concurring).

120. *Id.* (MCC briefed extensively regarding why § 324(A) should be adopted, presumably with the intent to shield itself from potential liability using Grace's bankruptcy).

121. *Id.*

122. Under the Court's § 324(A) analysis and holding.

123. 11 U.S.C. § 524 (2020) (creating a channeling injunction in asbestos bankruptcies that stops certain third-party claims against the debtor's insurer (Grace being the debtor, MCC being the debtor's insurer) from proceeding in state court).

124. *Maryland Cas. Co.*, at 914–15.

125. *Id.* at 915.

126. *Id.* at 917 (Shea, J., concurring).

127. *Id.* at 916–17 (McKinnon, J., concurring).

128. *Id.* at 916.

their conduct would cause harm to the claimant.<sup>129</sup> Applying Montana precedent to the present case, Justice McKinnon found that MCC's affirmative actions created a duty of care because MCC could obviously foresee that Grace's employees were being harmed without MCC's action and public policy encourages adequate worker safety plans.<sup>130</sup> She ultimately reached the same conclusion as the Court, but found the application of § 324(A) to be overly complicated.<sup>131</sup>

In light of *Maryland Casualty Company*, Montana practitioners should be aware that § 324(A) has been adopted and should be used when establishing whether a tortfeasor owed a special duty to a third party. This new adoption could entirely change the frontier of workers' compensation claims—including how employers and worker's compensation insurers format their relationships. Particularly, this case changes the outlook of the Asbestos Court, providing many potential plaintiffs with a huge step forward in recovering from their work-related asbestos injuries. Depending on a workers' compensation insurer's past actions, Plaintiffs may find an easier path to recover using this newly adopted section of the Restatement (Second) of Torts.

—Hannah Higgins

### III. *GREENWOOD V. MONTANA DEPARTMENT OF REVENUE*<sup>132</sup>

In *Greenwood v. Montana Department of Revenue*, the Montana Supreme Court held Greenwood did not sever his Montana Residency when he moved to Texas because he continued to represent himself as a Montana resident and continued to utilize the benefits of Montana residency.<sup>133</sup>

Clayton Greenwood ("Greenwood") and his family relocated from Texas to Montana in 1999. While living in Montana, Greenwood's children attended school, he registered to vote, obtained a Montana Driver's License and fishing licenses, opened a bank account, and registered vehicles in the state.<sup>134</sup> Greenwood continued to manage multiple businesses located in Texas during his time in Montana. Greenwood and his family returned to Texas in 2004.<sup>135</sup>

In 2013, the Montana Department of Revenue ("DOR") began an audit on Greenwood's non-resident individual income tax returns for 2008

129. *Id.* (citing *Fisher v. Swift Transp. Co.*, 181 P.3d 601, 607 (Mont. 2008); *Bassett v. Lamantia*, 417 P.3d 299, 309 (Mont. 2018)).

130. *Id.* at 916–17.

131. *Id.* at 917.

132. 2020 MT 149; \_\_\_ P.3d \_\_\_ (Mont. 2020).

133. *Id.* ¶ 19.

134. *Id.* ¶ 2.

135. *Id.*

through 2012.<sup>136</sup> The DOR requested Greenwood provide additional information to help determine his residency status. Greenwood provided information showing he had worked in Texas since 1977, owned real property and purchased vehicles in Texas, had healthcare and insurance in Texas, and employed an accountant in Texas from 2008 to 2012.<sup>137</sup> However, Greenwood had retained his Montana driver's license, voted in Montana in 2008, and continued to own property and receive mail in Kalispell.<sup>138</sup> Most importantly, Greenwood registered vehicles in Montana and claimed Montana residency for car insurance and hunting and fishing licenses.<sup>139</sup>

The DOR, after reviewing Greenwood's responses, found Greenwood was a Montana resident for tax purposes from 2008 to 2012. The DOR assessed \$515,321.02 in Montana resident income tax, interest, and penalties against Greenwood, who appealed the decision to the DOR's Office of Dispute Resolution ("ODR").<sup>140</sup> The ODR held a hearing on the appeal, where Greenwood testified he had received over twenty-one Montana resident hunting, fishing, and trapping licenses from 2008 to 2012.<sup>141</sup> Further, Greenwood testified he registered vehicles in Montana to avoid paying sales tax in Texas.<sup>142</sup> Following the hearing, ODR affirmed the DOR's decision.

Greenwood then appealed the ODR decision to the Montana Tax Appeal Board ("MTAB"), who affirmed the ODR.<sup>143</sup> In MTAB's decision, the Board was critical of Greenwood's credibility and his willingness "to misrepresent himself to save money on hunting licenses."<sup>144</sup> Following the MTAB decision, Greenwood petitioned the district court for an appeal, which the court denied.<sup>145</sup> He then appealed to the Montana Supreme Court.<sup>146</sup>

On appeal, Greenwood argued he abandoned his Montana residency when he returned to Texas in 2004.<sup>147</sup> He argues that during the 2008 to 2012 audit period, he was a Texas resident improperly claiming Montana

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136. *Id.* ¶ 3.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* ¶ 5.

141. *Id.*

142. *Id.* ¶ 6.

143. *Id.* ¶ 7.

144. *Id.* (quoting Findings of Fact, Conclusions of Law, Order and Opportunity for Judicial Review at p. 26, ¶ 31 (Montana Tax Appeal Board 2015)). The MTAB found Greenwood "saved over \$900 each year" by obtaining a Montana resident hunting and fishing license.

145. *Id.* ¶ 8.

146. *Id.*

147. *Id.* ¶ 16.

resident benefits.<sup>148</sup> Further, Greenwood argued the MTAB decision was not based on objective factors, but, rather, on his “improper and self-serving declarations of Montana residency.”<sup>149</sup> The DOR disagreed, arguing the MTAB’s findings of fact were founded on substantial evidence and showed that Greenwood was a Montana resident during the audit period, not simply improperly claiming Montana resident benefits.<sup>150</sup>

The Court began its analysis discussing the circumstances under which a person obtains Montana residency for state income tax purposes. Under Mont. Code Ann. § 15-30-2101(28), a person becomes a Montana resident if he or she (1) has a residence in Montana, or (2) “maintains a permanent place of abode in [Montana] and [ ] has not established a residence elsewhere.”<sup>151</sup> Further, the Court examined Mont. Code Ann. § 1-1-215, which provides that “a person may only have one residence,” and that a person cannot change their residence without “the union of act and intent.”<sup>152</sup>

In examining whether Greenwood was a resident, the Court found no facts supporting that Greenwood had a union of act and intent to end his Montana residency and become a resident of Texas.<sup>153</sup> The Court pointed to Greenwood’s “repeated[ ] . . . actions to maintain the benefits and privileges of Montana residency,” including obtaining resident hunting, fishing, and trapping licenses for each of the four years of the audit period.<sup>154</sup> Further, the Court highlighted that Greenwood represented himself as a Montana resident when he renewed his Montana driver’s license, when he obtained various recreation licenses and a Montana concealed carry permit, and when he voted in Montana.<sup>155</sup>

Greenwood benefitted greatly from holding himself out as a Montana resident, and, through his legal challenges, sought “to bear none of the cost.”<sup>156</sup> The Court upheld the district court’s affirmation of the MTAB’s administrative decision and deferred to the MTAB’s findings regarding the credibility of the evidence.<sup>157</sup>

The facts of this case and the Court’s decision highlight issues Montana practitioners should be cognizant of when working with clients relocating from Montana to another state, or who live in Montana for part of the

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148. *Id.*

149. *Id.*

150. Brief of Appellee at 6–9, *Greenwood v. Montana Dept. of Rev.* (Mont. March 11, 2020) (No. DA 19-0615).

151. *Greenwood* ¶ 12 (quoting MONT. CODE ANN. § 15-30-2101(28) (2019)).

152. *Id.* ¶ 13 (quoting MONT. CODE ANN. § 1-1-215).

153. *Id.* ¶ 17.

154. *Id.* ¶ 17–18.

155. *Id.* ¶ 18.

156. *Id.* ¶ 19.

157. *Id.*



year. The Court's decision here makes it clear that a person must show a union of act and intent when ending his or her Montana residency. Individuals who seek to benefit, in any way, from Montana residency do not satisfy this requirement. While Greenwood benefitted from his Montana residency in multiple ways, practitioners should advise their clients that any action, including maintaining a Montana driver's license, or voting in the state, could subject them to state income taxes.

—Katy Lindberg

### III. *RAMON V. SHORT*<sup>158</sup>

In *Ramon v. Short*, the Montana Supreme Court held, as a preliminary issue, that the Court's review of the district court's refusal to enjoin the Lincoln County Sheriff's hold of an inmate pursuant to a federal immigration detainer request was not moot because the constitutional issues involved in the case met the requirements of the public interest exception.<sup>159</sup> Further, the Court held a new arrest occurred when a Montana law enforcement officer carried out a federal immigration detainer,<sup>160</sup> and that Montana law enforcement officers do not have authority under Montana law to conduct a civil immigration arrest at the request of federal officials.<sup>161</sup>

Agustin Ramon ("Ramon") was arrested on August 3, 2018, for burglary and was held at the Lincoln County Detention Center on a \$25,000 bond.<sup>162</sup> The same day, the Border Patrol issued a Form I-247A detainer request to the Detention Center, requesting that the Detention Center not release Ramon for up to 48 hours after he was entitled to be released for the burglary charges.<sup>163</sup> The detainer request indicated the Department of Homeland Security had probable cause that Ramon was "a removable alien," and was in the United States in violation of civil immigration law.<sup>164</sup>

A bail bondsman attempted to post bail for Ramon on August 17, 2018, but was told Ramon would not be released, even if he posted bond, because of the Border Patrol's detainer request.<sup>165</sup> On October 30, 2018, Ramon filed a complaint, application for a temporary restraining order, preliminary injunction, and order to show cause, alleging the Sheriff's cooperation with the federal detainer request was in violation of Montana law. The Sheriff responded to the complaint, admitting Ramon would not be released

158. 460 P.3d 867 (Mont. 2020).

159. *Id.* at 875.

160. *Id.* at 876.

161. *Id.* at 880.

162. *Id.* at 871.

163. *Id.*

164. *Id.*

165. *Id.*

on bail, and stating that the Lincoln County Sheriff's Office had complied with immigration detainers on multiple occasions.<sup>166</sup>

The district court denied Ramon's request for a preliminary injunction and held Mont. Code Ann. § 7-32-2203(3) authorized the Sheriff to detain Ramon on a federal civil immigration detainer request.<sup>167</sup> Ramon appealed, arguing first that the public interest exception to the mootness doctrine applied because determining whether a Montana law enforcement officer had the authority to make a civil immigration detention was a question of public importance.<sup>168</sup> Addressing the merits, Ramon asserted that holding a person pursuant to an immigration detainer constitutes a new arrest, and that Montana law enforcement officers lack the authority to make such an arrest.<sup>169</sup> The Sheriff argued Ramon's appeal was moot because he was no longer detained and could not seek injunctive relief, arguing no exceptions to the mootness doctrine applied.<sup>170</sup> Further, the Sheriff argued a civil immigration detention pursuant to an immigration detainer request is authorized under Montana law.<sup>171</sup>

The Court first provided a background on immigration detainers, explaining that immigration detainers are civil matters and a person's illegal presence in the United States only amounts to a civil violation.<sup>172</sup> Additionally, the Court explained federal immigration detainers, like Form I-247A, only *request* state and local law enforcement's cooperation, and any mandate by the Department of Homeland Security about such matters would constitute commandeering under the Tenth Amendment.<sup>173</sup>

Next, the Court addressed the issue of mootness, finding that the questions presented—primarily whether a Montana law enforcement official “has the authority to grant federal civil immigration detainers and deprive Montana residents of their fundamental right to liberty based on a suspected civil violation”—was an issue of public importance.<sup>174</sup> Further, the Court reasoned resolution of this issue would provide guidance for Montana law enforcement officers confronting this issue with increasing regularity.<sup>175</sup>

The Court then discussed the merits of Ramon's appeal, holding that the grant of a federal immigration detainer request constituted an arrest

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166. *Id.* at 871–72.

167. *Id.* at 872.

168. Appellant's Opening Brief at 6, 9, *Ramon v. Short* (Mont. July 12, 2019) (No. DA 18-0661).

169. *Id.* at 7–8.

170. Defendant and Appellee's Amended Answer Brief at 2, *Ramon v. Short* (Mont. Sept. 9, 2019) (No. DA 18-0661).

171. *Id.* at 7.

172. *Ramon*, 460 P.3d at 872.

173. *Id.* at 873.

174. *Id.* at 874.

175. *Id.* at 874–75.

under Montana law, and finding that a Montana law enforcement officer lacks the authority to make a civil immigration arrest.<sup>176</sup> In determining whether granting a detainer request was an arrest, the Court highlighted the “broad consensus around the nation that an immigration detainer constitutes a new arrest.”<sup>177</sup> Further, the Court examined the statutory definition of “arrest,” as well as case law addressing the issue, concluding that “an immigration detainer effectuates a new restraint on an individual who otherwise would be free to leave the custody of a local law enforcement officer.”<sup>178</sup> In Ramon’s case, when he was refused release upon attempting to post bail, he was “effectively . . . [taken] back into custody,” which constituted a new arrest.<sup>179</sup>

After concluding the immigration detainer was a new arrest, the Court discussed whether a Montana law enforcement official had authority to conduct such an arrest.<sup>180</sup> The Court first addressed whether any federal statute authorizes state law enforcement officials to carry out civil immigration arrests.<sup>181</sup> Under federal law, state law enforcement officials may only perform immigration functions in four “limited circumstances,” including when (1) an agreement between state and federal governments is in place authorizing adequately trained state officers to act as immigration officers,<sup>182</sup> (2) “an actual or imminent mass influx of aliens arriving presents urgent circumstances requiring immediate Federal response,”<sup>183</sup> (3) a deported convicted felon reenters the United States, so long as the action is authorized under state law,<sup>184</sup> and (4) the arrested individual is violating criminal prohibitions under federal immigration law.<sup>185</sup> The Court concluded none of these limited circumstances were present in Ramon’s case.<sup>186</sup>

Because no federal law authorized the arrest, the Court examined whether such authority existed under state law.<sup>187</sup> The Court concluded no statute allows for warrantless civil immigration arrests.<sup>188</sup> While the district court and Sheriff asserted Mont. Code Ann. § 7-32-2203 provided authority

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176. *Id.* at 875, 880.

177. *Id.* at 875.

178. *Id.* at 876.

179. *Id.* at 876–77.

180. *Id.* at 877.

181. *Id.* at 878.

182. 8 U.S.C. § 1357(g).

183. 8 U.S.C. § 1103(a)(10).

184. 8 U.S.C. § 1252(c).

185. 8 U.S.C. § 1324; *Ramon*, 460 P.3d at 878 (citing *Arizona v. United States*, 567 U.S. 387, 408–09 (2012)).

186. *Id.* at 879.

187. *Id.* at 878 (citing *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017)).

188. *Id.* at 879.

for Ramon's arrest,<sup>189</sup> the Court disagreed, stating the statute does not provide authority for an arrest.<sup>190</sup> The Court further explained that the statute only addresses "who can be housed in a detention center," not who can be arrested.<sup>191</sup> The Court noted that while the Legislature has recently increased cooperation between state and federal officials related to immigration enforcement, no statute has yet been enacted authorizing civil immigration arrests.<sup>192</sup> Finally, the Court noted Montana common law also does not provide authority for such arrests.<sup>193</sup>

Justice Rice concurred with the majority, noting that while the state common law may have authorized state cooperation with federal authorities in the past, the Legislature's enactment of statutes addressing state cooperation with other federal immigration issues has "covered the issue."<sup>194</sup> Further, Justice Rice clarified that nothing in his concurrence or the majority opinion suggests state officials are "barred" from cooperating with federal authorities "about detainees and their detention status, or cooperation in other arrest contexts."<sup>195</sup>

The Court's decision is noteworthy for Montana practitioners working in criminal law or immigration law. Most importantly, the decision directly impacts how state law enforcement agencies may cooperate with federal immigration requests, specifically by prohibiting agencies from detaining individuals pursuant to a federal detainer request.

—Katy Lindberg

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189. Mont. Code Ann. § 7-32-2203 states that detention centers are used "for the confinement of persons committed for contempt or upon civil process or by other authority of law." The Sheriff argued, and the District Court agreed that immigration enforcement is a civil process, and was therefore authorized under the statute.

190. *Ramon*, 460 P.3d at 879.

191. *Id.* at 880.

192. *Id.*

193. *Id.*

194. *Id.* (J. Rice, Concurring).

195. *Id.*

